IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.1274 OF 2006

Shri Dilip Nevatia,)
Age: 56 years, Residing at)
52, Mamta-A, New Prabhadevi)
Road, Worli, Mumbai-400 025.) ...Applicant

Versus

1. Shri Vilas Yashwant Mitkar)
Residing at 61-C, Dallas)
Building, Dnyan Mandir Rd,)
Dadar (W), Mumbai-400 025.)

2. The State of Maharashtra) ...Respondents

Shri Bhujbal holding for Meghashyam Kocharekar for the Applicant.

Shri S.V.More, A.P.P for the State.

Shri Samir Sarambalkar for the Respondent No.1(absent).

CORAM : A. S. OKA, J.

DATE : DECEMBER 20, 2006.

ORAL JUDGMENT:

1. On 07th April, 2006, notice for final disposal at admission stage was issued. On 15th December, 2006 I heard the submissions of the learned Advocate appearing for the Applicant. As none appeared for the first Respondent, the Application was kept today. When the Application is called out today, none appears for the first Respondent.

2. The Applicant has been arraigned as the accused No.3 in the complaint filed by the first Respondent under section 138 of the Negotiable Instruments Act, 1881. The contention of the Applicant is that process could not have been issued by the learned Magistrate against him as necessary averments as required by section 141 of the said Act of 1881 are not found in the complaint. The learned Advocate for the Applicant has invited my attention to the averments made in the complaint and the verification statement of the first Respondent. The case of the first Respondent is that he was forced to take voluntary retirement as per the voluntary retirement scheme offered by the first accused which is a Private Limited Company. According to the case of the first Respondent, three cheques were issued in his favour in the sum of Rs.75,000/-, Rs.99,425/- and Rs.75,000/- respectively by the first accused in full and final settlement of the dues payable to the first Respondent under the voluntary retirement scheme. In paragraph No.5 of the complaint, it is alleged that the cheques were signed by the second accused on the behalf of the first accused. The said cheques have been dishonoured.

3. In the case of **S.M.S.Pharmaceuticals Limited Vs. Neeta Bhalla and Another [(2005) 8 Supreme Court**

Cases 89], the Apex Court had an occasion to deal with section 141 of the said Act of 1881. In clause (a) and (b) of paragraph No.19 of the said decision, the Apex Court held thus:

> "(a) It is necessary to specifically aver in a complaint under section 141 that at the time the offence was committed, the person accused was incharge of, and responsible for the conduct of business of the company. This averment is an essential requirement of section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of section 141 cannot be said to be satisfied.
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> (b) The answer to question posed in sub-para (b) has to be in negative. Merely being a director of a company is not sufficient to make the person liable under section 141 of the Act. A director in a company cannot be deemed to be incharge of and responsible to the company for conduct

> of its business. The requirement of section 141 is that the person sought to be made liable should be incharge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases".

4. Perusal of the complaint filed by the first Respondent shows that there are no averments made therein that at the time the offence was committed, the Applicant was incharge of, and responsible for the conduct of the business of company (accused No.1). Admittedly the cheques issued on behalf of the accused No.1 Company have been signed by the accused No.2. The Apex Court has held that such averment is an essential requirement of section 141 and has to be made in the complaint. The Apex Court specifically held that without this averment being made in the complaint, the requirements of section 141 cannot be said to be satisfied. In view of law laid down by the Apex court, the order issuing process will have to be quashed in so far as the Applicant is concerned. The Sessions Court while deciding the Revision Application filed by the

Applicant has referred to the aforesaid decision of the Apex Court. However, the Sessions Court has completely misdirected itself by observing that it was duty of the employer to satisfy the claim of his employee who has taken voluntary retirement. The learned Judge has not at all considered the legal effect of the failure of the first Respondent to make averments as required by section 141 of the said Act of 1881. Therefore, this Application must succeed.

5. Hence, I pass the following order:

(i) The order dated 11th April, 2000 passed by the learned Additional Chief Metropolitan Magistrate, 5th Court, Dadar, Mumbai in Case No.407/SS/2004 is quashed and set aside only in so far as the Applicant is concerned.

(ii) The learned Trial Judge will proceed with the complaint as against the first and second accused.

(iii) Application is allowed accordingly.

JUDGE